No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NO.

MELANIE CROWELL,

PETITIONER,

v.

UNITED STATES,

RESPONDENT.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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41 pp

QUESTION PRESENTED

Whether a warrant to search only a residence thereby authorizes search without probable cause of a purse in apparent possession of its owner, who is in the residence during the search but nowhere mentioned in the warrant?

LIST OF THE PARTIES

The parties to this proceeding are Melanie Crowell and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

_____

Petitioner Melanie Crowell hereby petitions this Court to issue a writ of

Ninth Circuit in the unpublished memorandum opinion of *United States of America v. Melanie Crowell*, dated November 30, 1993. The petition for rehearing in the Court of Appeals was denied on February 1, 1994.

OPINIONS BELOW

The unpublished Ninth Circuit opinion is reproduced in Appendix A. The Order of the Ninth Circuit denying Petitioner Melanie Crowell's Petition for Rehearing is reproduced as Appendix B.

JURISDICTION

The Ninth Circuit entered its opinion on November 30, 1993. A timely Petition for Rehearing with suggestion for Rehearing En Banc filed by Melanie Crowell ("Petitioner") was denied on February 1, 1994. This Court has jurisdiction to review the Ninth Circuit's opinion and judgment under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

A. Introduction

In this case, the Ninth Circuit upheld the order of the District Court, District of Hawaii, denying Petitioner's motion to suppress evidence. The Ninth Circuit upheld search of Petitioner Crowell's purse based on a warrant which authorized search only of the premises and made no mention of either visitors to or occupants of the premises. Although Petitioner did not physically possess the purse, it remained in her apparent possession, near her as she sat on a sofa. This Petition argues that the warrantless search of a purse in apparent possession of its owner violates the Fourth Amendment.

B. Facts

On November 14, 1991, federal law enforcement agents executed a warrant to search an apartment for certain documents, items of personal property tending to identify the owner(s) or occupant(s), and firearms and ammunition. The warrant *did not* mention search of any occupant or visitor in the apartment. ER 62-64.[1] At the suppression hearing, a federal agent testified that he had been informed by another agent prior to the search that Petitioner Crowell was a "resident" of the apartment, ER 136; although the government did not lay a foundation for this testimony, defense counsel did not object. *Id.*

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[1]ER citations are to the pages of Petitioner's excerpt of record filed with the Ninth Circuit in connection with petitioner's appeal.

When agents executed the warrant, Petitioner and another woman, each holding a baby, were sitting on a long sofa in the living room of the apartment. ER 140-141. Petitioner's purse sat at the foot of the sofa. ER 144. An agent began searching the purse; during that search he asked the women who owned the purse, and learned that it was Petitioner's. ER 145. The search revealed methamphetamine, and the District Court denied the motion to suppress. The Court of Appeals affirmed.

C. Procedural History

An Indictment filed in the District of Hawaii charged Petitioner Crowell with violation of 21 U.S.C. § 841(a)(1) (possession of crystal methamphetamine with intent to distribute. ER 1-2. At her arraignment, Petitioner pled not

guilty to both charges. ER 48. Before trial, Petitioner moved to suppress evidence pursuant to Rule 12 of the Federal Rules of Criminal Procedure, *Id.* Following an evidentiary hearing, the District Court denied the motion. ER 52.

The Ninth Circuit affirmed, holding that there was evidence that Petitioner

> "... was an occupant rather than a visitor to the premises[,] ...[and that] the purse was not in Crowell's possession at the time of the search. If a warrant sufficiently describes the premises to be searched it is appropriate to search all personal effects on the premises which might contain the items described in the warrant." Pet.App. 8a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECIDE WHETHER WARRANTLESS SEARCH OF A PURSE IN APPARENT POSSESSION OF ITS OWNER VIOLATES THE FOURTH AMENDMENT.

The search of Petitioner Crowell's purse was a Fourth Amendment violation of a gravity no less than search of her person. The warrant authorized search only of the residence, making no mention of either visitors to or occupants of the premises. As this court held in *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342 (1979), probable cause to search the premises where a person may happen to be does not thereby confer probable cause to search his person, because that search must be supported by probable cause *particularized* to his person. Searching Crowell's purse violated *Ybarra*'s principle in the same way that search of her person would. Crowell's purse

enveloped her most personal and private property, and Crowell, like most women, manifested the high privacy value in her purse by keeping it close to her.

Contrary to the Ninth Circuit's holding, a woman's *physical* possession of her purse should not be the primary consideration underlying her Fourth Amendment right; rather, her apparent personal possession should suffice. That "[t]he human anatomy does not naturally contain external pockets, pouches, or other places in which personal objects can be conveniently carried" is an anatomical deficiency in humans generally, *United States v. Graham*, 638 F.2d 1111, 1114 (7th Cir. 1981), *cert. denied* 480 U.S. 1034, 101 S.Ct. 1748 (1981), but the remedy for this defect, whether it be a man's pocket or a woman's purse, should not acquire

Fourth Amendment disfavor because the purse sits "next to" her owner, in contrast to the pocket "on" his person protected by the Fourth Amendment. Using this "on" the person "off" the person distinction, when treating a purse like a pocket, results in unequal treatment by according similar treatment to dissimilar groups.

As a historical matter, the word purse has evolved from when there was little difference between pocket and purse. *Oxford English Dictionary* defines pocket as "[a] small bag or pouch worn on the person; ... [especially] one inserted in or attached to a garment, for carrying a purse or other small articles." Second Edition, Volume XI, p.1107. As early as 1100, a purse was "[a] small pouch ... used for carrying money on the person."

Id., Volume XII, p.883. This definition had no necessary gender connection. Not until 1801 did our language describe what by today's standards would be called a woman's purse; then it was called a "reticule" or sometimes "ridicule," "[a] small bag ... for carrying on the arm or in the hand, used by ladies as a pocket or workbag." *Id.*, Volume XIII, p.778. "'Reticules' ... are a species of little workbag worn by the Ladies, containing Snuff-boxes, Billet-doux, Purses, Handkerchiefs, Fans, Prayer-books, Bon-Bons, Visiting Tickets." *Id.*, citing C.Wilmot, Let. 13 Dec. in *Irish Peer* (1920) 21. Not until 1955 did purse become accepted as meaning a woman's handbag. *Id.*, Volume XII, p.884. This evolution of language depicts change not only in etiquitte and fashion, but more

importantly in reasonable expectations of privacy. Over time men's garments varied, but they continued to have the pocket attached; by contrast, women's clothes eventually contemplated a carrying bag to hold not only money, the traditional item carried in the purse or pocket, but also a variety of other items she would consider private. The divergence of clothing reflects separate, gender-based expectations of privacy.

By today's standards, a man typically holds in his pockets the private things he carries, and a woman's purse holds her personal effects; when a man sits down on a chair or couch his pockets remain full, whereas a woman's purse often leaves her hands but usually rests closely next to her. But on the Ninth Circuit's view, glitter and tarnish sit side by side

because the man's pocket will retain its privacy right, but a woman's purse will not. It *might* make sense to criticize a man's claim to privacy in the wallet sitting next to him on the couch, but the analogy is not apt when it concerns the woman's purse sitting next to her. Men's and women's reasonable expectations of privacy do not function as symetrically as the Ninth Circuit's holding.

Although the other United States Courts of Appeal disagree in their analyses, no Circuit fairly treats the "problem" of the woman's purse. The First, Fifth, and Eleventh Circuits engage in the same erroneous analysis as the Ninth Circuit, shortchanging women's reasonable expectations of privacy. They test the relationship between the person and the place to determine the lawfulness

of a search of a purse not in its owner's physical possession. In such cases, searches of occupants of the premises are more likely to be permitted than of visitors. *United States v. Giwa*, 831 F.2d 538, 543-545 (5th Cir. 1987) (upheld search of overnight visitor's flight bag found in closet during premises search); *United States v. Micheli*, 487 F.2d 429, 431 (1st Cir. 1973) (upholding search of a briefcase during a premises search because owner of briefcase was also co-owner of premises); *United States v. Gray*, 814 F.2d 49, 51 (1st Cir. 1987) (search of non-resident defendant's jacket draped over chair during premises search upheld because of suspicious circumstances behind defendant's presence); *United States v. Young*, 909 F.2d 442, 444-445 (11th Cir. 1990), *cert. denied*, ____ U.S. ____,

112 S.Ct. 90 (1991) (in dicta, same analysis).

Even more unfair to women's expectations of privacy is the analysis of the D.C., Third, and Seventh Circuits, that only actual physical possession can protect a purse from being searched during a premises search. Women in American society generally understand that their purses are no less private when sitting next to them than when carried. Nonetheless, the District of Columbia Circuit in *United States v. Johnson*, 475 F.2d 977, 978-979 (D.C. Cir. 1973), permitted search of a woman's purse in her apparent though not physical possession, holding that a purse not worn does not constitute "... an extension of ... [the owner] so as to make the search one of her *person*" (emphasis in original); there the

defendant, a visitor to the premises during the premises search, was sitting on a couch while her purse sat on the coffee table immediately in front of the couch. Using the same analysis, *United States v. Branch*, 545 F.2d 177, 182 (D.C. Cir. 1976), held as impermissible the search of a shoulder bag in an apartment where the owner of the bag, apparently a mere visitor to the apartment, carried it suspended from her shoulder while entering the apartment during the premises search. Similarly, in *United States v. Martinez-Zayas*, 857 F.2d 122, 133-134 (3rd Cir. 1988), agents -- just before executing a warrant for search of a premises -- observed defendant, occupant of premises, enter carrying a purse; the Third Circuit upheld the agents' search of her purse because it was not in her physical

possession, even though it sat only four feet from her. The Seventh Circuit is in accord. *United States v. Teller*, 397 F.2d 494 (7th Cir. 1968), *cert. denied* 393 U.S. 937, 89 S.Ct. 299 (1968) upheld search of a purse because the owner had set her purse down on a bed momentarily during a premises search, and thus by relinquishing her physical possession thereby she relinquished her reasonable expectation of privacy in the purse. *See United States v. Graham*, *supra*, 638 F.2d at 1114 (7th Cir. 1987) (a shoulder purse carried by a person at the time he is stopped lies within the scope of a warrant authorizing the search of his person because the purse is in his physical possession).

Neither the Ninth nor any other Circuit properly examines the warrantless search of a woman's purse not in her

physical possession, but in her apparent possession. Articles in a purse sitting next to her owner should be no less private than when carried. Men encounter this problem rarely, as their dress contemplates holding private things in their pockets, which they obviously cannot remove. The Circuits' resolution of this problem abridges women's reasonable expectations of privacy.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-10524

D.C. No. CR-91-01824-01-HM

UNITED STATES OF AMERICA
Plaintiff-Appellee,

V.

MELANIE CROWELL,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted August 30, 1993
San Francisco, California

Before: D.W. NELSON and NORRIS, Circuit Judges, and BELLONI, Senior District Judge**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Honorable Robert C. Belloni, Senior District Judge for the District of Oregon, sitting by designation.

Appellant Melanie Crowell appeals the district court's denial of her pretrial motions. After the district court denied Crowell's motion to suppress the fruits of a search warrant and motion to suppress statements, Crowell entered a conditional guilty plea to one count of possession with intent to distribute a quantity of crystal methamphetamine in violation of 21 U.S.C. § 841(a)(1). Crowell contends that the district court improperly relied on information secured through a wiretap order; that the search warrant was not supported by probable cause; that the search of her purse exceeded the scope of the search warrant; that the officers executing the search warrant failed to properly knock and announce their presence; and that the court should have suppressed her post-Miranda statements. We affirm the decision of the district court.

DISCUSSION

1. The Wiretap Order

Crowell contends that the district court erred by relying on evidence obtained through an

improper wiretap order. Crowell contends that allinformation derived through the wiretap should be excluded from the affidavit in support of the search warrant. Crowell argues that when the wiretap information is excluded the search warrant lacks probable cause.

We find that the issue of the adequacy of the wiretap order is not ripe for review. The district court did not rule on Crowell's wiretap motion, and did not consider information derived through the wiretap in determining the adequacy of the search warrant. Likewise, we will not rely on information obtained through the wiretap in considering the issue of probable cause.

2. Probable Cause

Crowell contends that the affidavit in support of the search warrant for 217 Prospect Street does not establish probable cause to search that location. Crowell concedes that the affidavit of Agent Harmon contains sufficient information to indicate that Darwin Kaneaiakala was involved in narcotics trafficking and that he had some

connection with the apartment at 217 Prospect Street. However, Crowell argues that the affidavit does not support the conclusion that the apartment was Kaneaiakala's residence, or that it was associated in any way with drug trafficking.

"Probable cause exists when, considering the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place." United States v. Ocampo, 937 F.2d 485, 490 (9th Cir. 1991) (internal quotations omitted). The court need not determine that the evidence sought is actually on the premises to be searched, or even that the evidence is more likely than not to be found there. United States v. Fannin, 817 F.2d 1379, 1382 (9th Cir. 1987). The court need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit. Id.

It is well established that "'[i]n the case of drug dealers, evidence is likely to be found where the dealers live.'" Id. (quoting United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986)). The affidavit contains several facts

which support the district court's finding that the apartment at 217 Prospect Street was Kaneaiakala's residence. A drug dealer who worked with Kaneaiakala gave an informant the telephone number for the apartment, describing it as Kaneaiakala's home telephone number. An undercover agent subsequently telephone Kaneaiakala at that number on four occasions. An undercover agent also drove with Kaneaiakala to the apartment complex, where Kaneaiakala used a garage door opener to gain entry to the secured parking lot, parked in an assigned slot, and stated that he had to go inside and get something from his apartment. Agent Harmon later ascertained that the entry phone register for 217 Prospect Street listed a number for D. Kaneaiakala.

Crowell acknowledges that the affidavit shows some connection between Kaneaiakala and 217 Prospect Street, but argues that the court disregarded information in the affidavit which suggests that Kaneaiakala had another residence. Crowell mistakenly assumes that the affidavit is invalid unless it establishes that the place to be searched is Kaneaiakala's exclusive residence. We

have previously held that the residency rule applies in the case of a residence associated with an assistant as well as a ringleader. See Angulo-Lopez, 791 F.2d at 1399. The reason given was that, in the case of drug dealing, "a fair probability exists that drugs will be present at the assistants' residence as well as the ringleader's." Id. If the residency presumption applies int he case of locations associated with different members of a drug ring, we see no reason why it should not apply to different residences associated with the same suspected dealer. The fact that there are multiple residences does not necessarily mean that there is any less of a "fair probability: that the relevant evidence would be found at any one of them, for the rationale behind the presumption is that drug dealing is the type of crime committed out of covert private locations.

In this case, the affidavit indicates that Kaneaiakala and his fellow drug trafficker, Kitagawa, were associated with more than one address. Under these circumstances, it was reasonable for the court to conclude that the

apartment at 217 Prospect Street was Kaneaiakala's residence, although not necessarily his only residence, and that records relating to drug distribution were likely to be found there. We conclude that the affidavit in support of the search warrant established a sufficient nexus between the location to be searched and the evidence sought.

3. The Scope of the Search Warrant

During the execution of the search warrant, Crowell's purse was searched and 24 grams of crystal methamphetamine were discovered within a small change purse. Crowell contends that the search of her purse and items inside it exceeded the scope of the search warrant because the warrant did not specifically mention Crowell or her possessions. She argues that the facts in this case are analogous to the facts in United States v. Robertson, 833 F.2d 777 (9th Cir. 1987), which involved the search of a backpack carried by a visitor who was leaving a house. See id. at 783-85.

However, the facts in this case are

distinguishable from those in Robertson. First, there is evidence that Crowell was an occupant rather than a visitor to the premises. In addition, in contrast to the backpack in the Robertson case which was in the physical possession of a person detained outside the premises, the purse was not in Crowell's physical possession at the time of the search. If a warrant sufficiently describes the premises to be searched it is appropriate to search all personal effects on the premises which might contain the items described in the warrant. United States v. Gomez-Soto, 723 F.2d 649, 654 (9th Cir. 1984).

In this case, the search warrant authorized the search of apartment F-4 in the 217 Prospect Street complex for records relating to the distribution of controlled substances, relating to income and expenditures of money from controlled substances, and relating to the identity of persons in residence, occupancy, control or ownership of the premises. At the evidentiary hearing on Crowell's motion to suppress, agents testified that they had reason to believe that Crowell was an

occupant rather than a mere visitor to the apartment. The agent also testified that drug dealers commonly maintain records of their transactions and associates, but that such records are not necessarily kept in a formal manner and may be hidden in almost any location. The agents testified that they would anticipate finding records such as the telephone numbers of drug associates in a small container like Crowell's change purse.

Based on the evidence in the record, the agents could reasonably conclude that Crowell's purse and the change purse within it might contain documents sought by the search warrant. Therefore, the district court did not err in holding that the search of Crowell's purse and change purse were within the scope of the search warrant.[1]

4. The Knock and Announce Requirement

Crowell contends that the agents executing

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[1] In light of this holding it is unnecessary to reach the United States' contention that the search falls within the good faith exception set out in United States v. Leon, 468 U.S. 897 (1984).

the search warrant did not satisfy the knock and announce requirement of 18 U.S.C. § 3109 when they entered the apartment at 217 Prospect Street. The district court found that Agent Harmon knocked there times, said words to the effect of "federal agents with a search warrant," and forced the door open after waiting approximately five seconds. The court accepted Agent Harmon's testimony that he believed that there was danger to law enforcement officers and occupants of the premises if there was a long delay between the knock and entry. The court concluded that exigent circumstances justified the very brief pause between the agent's knock and announcement and the use of force to enter the apartment.

Section 3109 of Title 18, United States Code states:

> The officer may break open any outer or inner door or window of a house or any part of a house, or anything therein, to execute a search warrant if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Implicit in this provision is the requirement that

the officer wait a reasonable period of time after the announcement to give the occupants a chance to grant or refuse admittance. The amount of time that is reasonable depends upon the circumstances of each case. United States v. McConney, 728 F.2d 1195, 1206 (9th Cir.) (en blanc), cert. denied. 469 U.S. 824 (1984).

Compliance with section 3109 is excused when exigent circumstances make such procedures imprudent, as when the officer executing a search warrant holds a "reasonable belief that announcement might place him or his associates in physical peril." United States v. Ramirez, 770 F.2d 1458, 1460 (9th Cir. 1985) (internal quotations omitted). Exigent circumstances may also exist where there is a reasonable fear for the safety of bystanders or occupants of the premises to be searched. United States v. Turner, 926 F.2d 883, 886 (9th cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 103, 116 L.Ed.2d 73 (1991).

The United States contends that exigent circumstances were adequately demonstrated by Agent Harmon's testimony that: 1) he believed that

Kaneaiakala, Crowell, and her infant child were likely to be present at the apartment; 2) he had information that Kaneaiakala was often armed and that he had shown a propensity to use violence; and 3) he believed that the layout of the apartment could increase the danger to agents if entry was delayed. Crowell contends that the district court should not have given credibility to this testimony, arguing that if the agents really feared a violent response they would have entered the apartment as quickly as possible, without announcing their presence at all.

However, the evidence does not compel a finding that this was the only reasonable cause. The agents reasonably could have believed that it was safer to announce themselves as federal agents than to let the occupants assume that they might be unlawful intruders. The evidence in the record supports the district court's finding that the agents executing the search warrant reasonably believed that further delay in entering the premises could have endangered agents or occupants of the apartment. Therefore, the district court

did not err in finding that exigent circumstances excused further compliance with section 3109.

5. Motion to Suppress Statements

Crowell contends that the district court erred by failing to suppress statements she made while in custody. The United States contends that this issue is not properly before this court because Crowell's plea agreement did not reserve the right to appeal the ruling on her motion to suppress statements.

Rule 11(a) (2) of the Federal Rules of Criminal Procedure provides that a defendant may enter a conditional plea of guilty "reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion." A defendant's failure to make a written reservation as to a specific motion deprives the reviewing court of jurisdiction to review the omitted issue. United States v. Echegoyen, 799 F.2d 1271, 1275-76 (9th Cir. 1986).

Paragraph 4 of Crowell's plea agreement reserves the right to appeal "this Court's denial of the Defendant's motion to suppress the fruits of

a search warrant executed on November 14, 1991." The plea agreement does not mention Crowell's motion to suppress statements, which was filed separately from the motion to suppress the fruits of the search warrant. Accordingly, Crowell did not reserve the right to appeal the denial of her motion to suppress statements, and this court does not have jurisdiction to review the issue.

CONCLUSION

The decision of the district court is affirmed in all respects.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 92-10524

UNITED STATES OF AMERICA
Plaintiff-Appellee,

V.

MELANIE CROWELL,
Defendant-Appellant.

O R D E R

Before: D.W. NELSON and NORRIS, Circuit Judges, and BELLONI, Senior District Judge**

** Honorable Robert C. Belloni, Senior District Judge for the District of Oregon, sitting by designation.

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Nelson and Norris have voted to reject the suggestion for a rehearing en banc, and Judge Belloni has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a voted on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.

** Honorable Robert C. Belloni, Senior District Judge for the District of Oregon, sitting by designation.